STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals,
Owens, P.J, Murphy, and Hoekstra, J.J.

TERIDEE LLC, a Michigan limited liability company; THE JOHN F. KOETJE TRUST, u/a/d 5/14/1987, as amended; and THE DELIA KOETJE TRUST, u/a/d 5/13/1987, as amended,

Plaintiffs/Appellees,

v

CLAM LAKE TOWNSHIP, a Michigan municipal corporation; and HARING CHARTER TOWNSHIP, a Michigan municipal corporation,

Defendants/Appellants.
_____/

Supreme Court Docket No. 153008

Court of Appeals Docket No. 324022

Wexford County Circuit Court
Case No. 13-24803-CH

Hon. William M. Fagerman

APPELLANTS' REPLY BRIEF

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Appellants, Clam Lake Township and Haring Charter Township (collectively, "Townships"), file this Reply Brief, as authorized by MCR 7.312(E)(3).

REPLY TO APPELLEES' COUNTERSTATEMENT OF FACTS

As global observation, it seems that Appellees have forgotten which appeal they are briefing.[1] This particular appeal presents the narrow issue of whether the design standards of the Townships' 2013 Act 425 Agreement contractually restrict Haring's zoning authority, and if so, whether the design standards are nonetheless authorized by Act 425 and/or severable. But Appellees nonetheless devote a majority of the first 14 pages of their brief to a discussion of other irrelevant matters, such as the SBC proceedings on the Townships' 2011 Agreement (which doesn't even exist anymore); whether the Townships' Agreement interferes with annexation (not relevant here); and e-mails that a neighborhood gadfly (George Giftos) sent to the neighborhood opposition group and cc'd to the Township Supervisors (also not relevant here).[2] The Court should disregard this chaff.

Appellees are also attempting to deliberately mislead the Court about the Board members' deposition testimony. A cute "trick" that Appellees are trying to play is to cite isolated, out-of-context testimony, to the effect that Haring is not required, by the Agreement, to provide "any utilities to any property in Clam Lake." Appellee's Brief at pp. 14-15. This is a "trick," and not an honest presentation of the testimony, because Appellees are purposefully omitting the predicate explanation that always preceded this particular line of deposition questioning, which was that the Transferred Area is *not* considered a part of Clam Lake (i.e., it has been transferred to Haring under the Agreement). Thus, the only thing the Board members were saying is that, *except for the Transferred Area*, the Agreement does not require Haring to extend sewer/water services to *other*

[1] More specifically, Appellees seem to have forgotten that they are not briefing Docket No. 151800, involving the SBC's decision to invalidate the Townships' Act 425 Agreement on statutory grounds.

[2] The Court will observe the subtle non-truth that Appellees are attempting to perpetuate here, by falsely claiming that the Supervisor "exchanged" e-mails with Mr. Giftos. Mr. Giftos' e-mail was a *one-way* communication with a neighborhood opposition group of 32 residents, which he copied to the Supervisor. Appendix, 2b-3b. The Supervisor ignored the e-mail, and thus never "exchanged" anything with Mr. Giftos.

areas of Clam Lake, such as the Clam Lake DDA or to the Berry Lake area. *See* Appendix, 722a-723a (Mackey Dep) (referring only to the Clam Lake DDA District); *id*., 953a-954a (McCain Dep) (sewer/water not required to "other areas of Clam Lake" outside of the Transferred Area); *id*., 758a-759a (Kitler Dep) (explaining that Haring sewer/water is required to go to the Transferred Area, but that there is no guarantee that it would go to the DDA or to Berry Lake); *id*., 983a-985a (Soule Dep) (referring to service "outside of the transferred area").

But that is not the case for the Transferred Area, which, as Appellees expressly admit, is "required" to receive Haring sewer/water services under the terms of the Agreement. *See* Pls' Amd Compl at ¶¶57-59. Indeed, so adamant are Appellees in their insistence that the Agreement "requires" Haring to provide water and sewer service to the Transferred Area that they allege that this requirement actually constitutes an unlawful restriction on Haring's legislative authority over its utilities. *Id*.[3] Consistent with Appellees' binding admission on this point, the Board members expressed the near unanimous position that Haring's requirement to extend sewer and water services to the Transferred Area was *the* central or *the* most important reason for entering the Agreement. Appendix, 617a (Payne) (sewer and water are "important" aspect of Agreement); *id*., 654a (Rosser) ("number one" purpose of Agreement was to extend sewer/water); *id*., 708a-709a, 723a-724a (Mackey) ("biggest thing was to try to get water and sewer to our business district"); *id*., 740a (Kitler) ("major" component of Agreement is sewer); *id*., 790a (Wilkinson) ("primary reason" for Agreement was "to expand infrastructure of water and sewer"); *id*., 839a-840a, 842a (Whetstone) (primary "benefit" of Agreement is "water and sewer"); *id*., 864a (Baldwin) ("fantastic" aspect of Agreement is new sewer revenue from Clam Lake); *id*., 905a-907a, 908a-909a, 912a, 913a

[3] Herein lies the un-reconcilable and impermissible conflict presented by Appellees' position. Their Amended Complaint expressly admits that the Agreement "requires" Haring to provide water/sewer service to the Transferred Area (Pls' Amd Compl at ¶¶57-59), yet Appellees simultaneously argue that the Agreement is illusory because it doesn't require Haring to provide water/sewer to the Transferred Area. They can't do this. *Monaghan v Pavsner*, 347 Mich 511, 523-524; 80 NW2d 218 (1956).

(Fagerman) (primary benefit of Agreement is extension of sewer and water); *id*., 973a-974a (Soule) (the "highest point" justifying the Agreement was extension of water and sewer) pp. 8-9; *id*., 1055a (Scarbrough) (primary benefit of Agreement is sewer and water to Clam Lake).

Another misrepresentation of deposition testimony appears later in Appellees' Brief, where they allege that three Board members (Soule, Baldwin and McCain) testified that the zoning requirements of the Agreement are binding on Haring. Appellees' Brief at p. 34. This is just another cute "trick"[4]. The "trick" being played in this instance is to ignore the fact that Appellees' counsel, when deposing the Board members, was improperly asking the Board members to read only a few select words of the Agreement in isolation, and to then demand an answer about what those words mean, in isolation. Specifically, Board members were asked to read isolated portions of Art. I, §6.a.1 or §6.a.2 of the Agreement, and then asked whether those select words required Haring to adopt certain zoning provisions or approve a certain development proposal. Appendix, 869a-872a (Baldwin); *id*., 1023a (Soule).

But if Appellees were to be forthright with the Court, they would acknowledge that 10 of the 12 Board members testified that, when reading the Agreement *as a whole*, with Art. I, §6.c taken into account, the proper interpretation is that Haring retained its legislative authority to determine the final content of the zoning regulations that can be applied to the Transferred Area. *Id*., 608a-611a (Payne Dep) (Haring has "unconditional authority to change" the zoning); *id*. 639a-640a (Peterson Dep) (Haring can do "whatever they want" with the zoning); *id*., 657a-658a (Rosser Dep) (agreeing that Haring has "unconditional authority to zone property as Haring Township sees fit"); *id*., 741a-742a (Kitler Dep) (agreeing that "Haring has unfettered discretion as to" how the Transferred Area is zoned); *id*., 816a-817a (Wilkinson Dep) (agreeing that Haring may amend the PUD regulations); *id*., 838a (Whetstone Dep) (Haring zoning controls); *id*., 885a (Baldwin Dep) (agreeing that Haring may

[4] The only exception is Trustee McCain, who, as the Township has already admitted, is the sole Board member who erroneously believed that the design standards of the Agreement are binding on Haring.

adopt PUD regulations for the Transferred Area that are different than those in the Agreement); *id*., 908a, 924a-925a (Fagerman Dep) (explaining that Agreement controls only initial zoning status, but Haring thereafter controls property in a manner consistent with Haring master plan and zoning ordinance); *id*., 1012a-1014a (Soule Dep) ("Haring's zoning ordinance takes precedence . . . over the minimum requirements" of the Agreement); *id*., 1033a-1035a (Scarbrough Dep) (Haring Township has final say on zoning for the Transferred Area).

REPLY ARGUMENTS

I. APPELLEES' ARGUMENTS ARE PREDICATED ON AN AGREEMENT THAT DOES NOT EXIST ANYMORE

Appellees' entire argument is predicated on a form of Act 425 agreement that no longer exists, and which has not existed since October 21, 2013. More specifically, Appellees' entire argument is predicated on the Townships' *original* Act 425 Agreement, which, as the Townships have already admitted (Appellants' Brief at pp. 7-8), could have been construed as requiring Haring to adopt (at least initially) specified mixed-use PUD regulations into its zoning ordinance. But it is undisputed that that particular Agreement no longer exists. It was replaced with the First Amended Agreement on October 21, 2013, which swapped out and replaced the original PUD design standards with materially-different PUD design standards that Haring had already independently developed and adopted, *before* the First Amendment became effective, such that the Amended Agreement requires Haring to do *nothing*, insofar as adopting specified PUD standards is concerned. *Id*. at pp. 8-10. This fundamental change from the original Agreement, when coupled with Haring's continuing authority, under Art. I, §6.c, to amend the zoning standards for the Transferred Area, results in an undisputed factual context where Haring has the unilateral and unfettered authority to determine the zoning standards that can be applied to the Transferred Area.

But Appellees just ignore these dispositive facts, and instead repeat the wooden mantra over and over again, that the *original* Agreement required Haring to adopt specified PUD design

standards. *See*, e.g., Appellees' Brief at pp. 4, 20, 21, 33, 34, and 36. Nowhere is this fatal error made more evident than at pages 34-35 of Appellees' Brief, where Appellees attempt to show that the design standards of the Agreement unlawfully bind Haring by pointing to certain e-mails and letters from the Township attorney, which made reference to Haring being "constrained" by the minimum PUD standards of the Agreement. AE's Appx. at 104b-105b, 108b. But what Appellees are ignoring is the fact that these items were drafted in the April-May, 2013 timeframe (*id.*), and were thus commenting only on the *original* Agreement, which no longer exists. And so the cited correspondence of the Township attorney does nothing more than confirm exactly what the Townships have already stated in their own pleadings, to wit, that the *original* Agreement could have been construed as requiring Haring to adopt (at least initially) certain PUD standards in its zoning ordinance. But that has nothing to do with the *Amended* Agreement that was in effect at the time of the lower court decisions, which does not require Haring to adopt any specified PUD standards.

But it is of no surprise that Appellees have continued to ply the Court with this exact same strategy, of relying on an agreement that no longer exists. Appellees have been successful in pulling the wool over the eyes of two lower courts already, whom inexplicably failed to even mention the legally dispositive fact that Art. I, §6.a.2 of the *Amended* Agreement requires Haring to do nothing. Having succeeded with this same strategy twice already, Appellees apparently believe that the same deception will work in this Court. It should not succeed; reversal is required.

II. APPELLEES WANT THE COURT TO REWRITE THE AGREEMENT

In the Court of Appeals proceedings, the Townships pointed out a fatal error in the circuit court's reasoning: the circuit court held that Art. I, §6.c of the Agreement could not have the meaning ascribed to it by the Townships[5], which thereby rendered Art. I, §6.c nugatory and mere surplusage – having no meaning at all. Appellants' COA Brief at p. 35-36. The Court of Appeals

[5] Specifically, that Art. I, §6.c allows Haring, by subsequent amendment of its zoning ordinance, to determine the final content of the zoning regulations that apply to the Transferred Area.

rightly corrected the circuit court on this point, holding that Art. I, §6.c allows Haring to "amend" the zoning regulations that could be applied to the Transferred Area. Appendix, 45a (holding that, under Art. I, §6.c, "Haring may later amend its zoning ordinance over the transferred area.").[6]

Appellees now attempt to resurrect the circuit court's errant thinking on this point, by arguing that Art. I, §6.c actually has another meaning. Appellees, as strangers to the Agreement, theorize that Art. I, §6.c means that Haring can subsequently amend the provisions of its zoning ordinance, "except . . . the zoning restrictions and regulations in Article I, Section 6." Appellees' Brief at p. 24 [emphasis in original]; *see* also, *id*. at p. 30. The Court should query from whence this particular "excepting" language might come from, because it does not appear in the Agreement. Appellees are thus asking the Court to re-write and supplement Art. I, §6.c so that it reads as follows:

> After such amendments to the Haring zoning ordinance, and for the Duration of the Conditional Transfer, the Transferred Area shall be subject to Haring's Zoning Ordinance and building codes as then in effect or as subsequently amended, ***except those amendments that might be different from those stated in Article I, Section 6***. [added language in bolded italics].

But that is not what Art. I, §6.c says. Instead, the plain language of Art. I, §6.c preserves to Haring the *unqualified* power to make the Transferred Area subject to "subsequent amend[ments]" to its zoning ordinance, without any limitation stated in the Agreement whatsoever. Because the Court is without authority to re-write the Agreement[7], Appellees' interpretation of Art. I, §6.c must be rejected. In accordance with firmly established Michigan law, the Court is required to prefer and give effect to an interpretation which (a) flows from the plain, *unqualified* language of Art. I, §6.c and, (b) renders the Agreement lawful. To that end, the Townships' interpretation must prevail.[8]

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[6] Appellees misrepresent the Court of Appeals' holding on this issue, by purposefully omitting that portion of the opinion that expressly recognizes Haring's authority to later amend the zoning for the Transferred Area. *See* Appellees' Brief at p. 24.

[7] *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199-200; 747 NW2d 811 (2008).

[8] Appellees are making a material misrepresentation to the Court, when they allege that the Townships "do not dispute" that the Haring zoning ordinance requires Haring to apply the more stringent PUD standards "*in the Act Agreement*" over any less stringent PUD standards of the zoning ordinance. Appellees' Brief at pp.

That said, the Townships do appreciate the drafting advice from Appellees, to wit, that they would have drafted Art. I, §6.c more explicitly, so as to state that Haring is "not bound by the specific zoning requirements in Article I, Section 6." Appellees' Brief at pp. 23-24. Perhaps that's a good idea. But it's an immaterial idea, insofar as this appeal is concerned. The Court is not here to decide who has a better idea for preserving Haring's authority to amend its zoning ordinance. That same goal can be accomplished by any number of drafting choices. By way of analogy, the Court can consider a hypothetical situation where person "A" is driving north, and person "B" wants to tell "A" to take a left turn. This could be accomplished by any number of commands, such as: "turn directly left"; "change course to west"; "bear 90° left"; "turn to a compass heading of 270°"; or "turn directly to port." The level of clarity achieved by any one of these stylistic choices is certainly a debatable subject. But at the same time, it cannot be denied that any one of them still takes you to the same place: left. And the same reasoning also applies to the stylistic drafting choice made by the Townships, as compared to the choice Appellees would have made. It can be said either that:

- "The Transferred Area is subject to subsequent amendments to the Haring Zoning Ordinance" (as the Townships decided); or,
- "Haring is not bound by the specific zoning requirements in Article I, Section 6" (as Appellees would apparently prefer).

But just like in the above analogy about turning left, either option still takes you to the same place – Haring still has the legislative authority to determine the final content of the zoning regulations that apply to the Transferred Area, by way of amending its zoning ordinance. And Appellees gain no ground against this conclusion by repeating (at least seven times) the *ipse dixit* that the Townships' interpretation is either illogical, irrational, untenable, or lacking commonsense.

22-23. That is false; the Townships have never adopted that incorrect interpretation. Instead, as the Townships have expressly pointed out (Appellants' Brief at pp. 33-35), Section 422.3(g) of the Haring zoning ordinance states that the mixed-use PUD standards ***of the zoning ordinance*** (i.e., *not* of the Agreement) shall prevail over any less-stringent general PUD design standards of the zoning ordinance. And because Haring has the authority, under Art. I, §6.c of the Agreement, to determine the final content of the mixed-use PUD standards of its zoning ordinance, Haring is thus not bound to apply the mixed-use PUD standards of the Agreement.

Appellee's Brief at pp. 23, 25, 26, 30, 31, and 32. In this respect, it appears that Appellees have not asked themselves the most obvious of questions: "Why it is illogical, irrational or nonsensical for the Townships to have drafted their Agreement in a manner that complies with Michigan law, by including a provision that preserves Haring's final zoning authority over the Transferred Area?" Isn't this exactly what municipalities should strive to do – to enter legal agreements?

That's what the Townships did; they intentionally included Art. I, §6.c to ensure that the Agreement complies with Michigan law, by preserving to Haring its authority to determine the final content of the zoning standards that could apply to the Transferred Area. They did this by expressly preserving Haring's right to make the Transferred Area subject to *all* subsequent amendments to the Haring zoning ordinance, without any limitation whatsoever. That is the proper and lawful interpretation of Art. I, §6.c, and it is the interpretation that requires reversal of the lower courts.

III. ART. I, §3 OF THE AGREEMENT SATISFIES ACT 425

The Townships have already demonstrated that the Act 425 Agreement would still be valid if the design standards of Art. I, §6 were severed, because Art. I, §3 of the Agreement (which Plaintiffs' Amended Complaint does not even challenge) independently has the purpose of a planned economic development project, in compliance with Act 425. Appellants' Brief at pp. 43-47. Appellees incorrectly argue that the Townships have raised this as a "new" issue. Appellees' Brief at p. 47. That is false. In the trial court, the Townships argued that Art. I, §3 is *the* provision of the Agreement that has the purpose of a planned economic development project, while Art. I, §6.c simply gives Haring the final authority to fill-in the final details of how the Transferred Area is to be zoned and regulated.[9] Thus, the issue was expressly raised and preserved in the trial court.

Appellees also incorrectly argue that Art. I, §3 cannot independently satisfy Act 425 because a conditional transfer agreement must "establish" an economic development project, which

[9] *See* Defs' Response in Opp to Pls' Motion for Leave to File Supp. Brief at pp. 4-5 (filed 8/15/14).

Appellees claim Art. I, §3 does not do. Appellees' Brief at p. 48. They are wrong on at least two scores. As a principal matter, the word "establish" does not appear anywhere in Act 425. Instead, the statute merely requires that an agreement have the "purpose of an economic development project." MCL 124.22(1). Moreover, an "economic development project" is itself defined by the statute as a "*planned* improvements," meaning a project that is not already established. Art. I, §3 of the Agreement, by itself, satisfies these statutory requirements because (a) it expressly identifies the purpose of the Agreement as being for a particular type of mixed-use residential/commercial development, and (b) it identifies the type of improvements that will facilitate that type of mixed-use development, by planning for the extension of Haring sewer/water services to the Transferred Area. This is a textbook example of a valid economic development project under Act 425.

And Appellees are being more than a little disingenuous when they attempt to diminish the significance of Art. I, §3 by alleging that the Townships characterized the *entirety* of amended Art. I, §3 as being only a "minor change" to the Agreement. Appellees' Brief at p. 48. In truth, Art. I, §3 has always been a central part of the Agreement, in nearly the identical form, since the Agreement's original inception. Appendix, 297a. The "minor change" that the Townships mentioned in their Court of Appeals brief is only that minor amendment which added an explicit reference to the *Corridor Study*, in the Second Amended Agreement (*id.*, 482a). That particular amendment is properly characterized as "minor" because the Townships had already agreed, over a decade ago, that the design standards of the *Corridor Study* should apply to Transferred Area (*id.*, 236a-290a). But that does not diminish the legal fact that Art. I, §3 has always been the central part of the Agreement that has the purpose of an economic development project, in satisfaction of Act 425.

IV. SECTION 6(c) OF ACT 425 IS NOT JUST "A LITTLE BIT PREGNANT"

When reading Appellee's arguments about Section 6(c) of Act 425, the term "a little bit pregnant" comes to mind. Which is to say the Appellees are forced to admit that Section 6(c) allows

the legislative authority of a transferee unit to be contractually bound *to some degree*, to wit, by compelling a transferee unit to adopt a certain type of ordinance (such as a building code) that it did not previously have in effect (Appellees' Brief at p. 40), or to compel the transferee unit to allow a specific use, such as a Meijer store (*id*. at p. 43).[10] But Appellees cannot even begin to explain how Section 6(c) may lawfully impose such significant contractual requirements on legislative action, while at the same time not allowing the Townships to enter their much less restrictive Agreement, through which the Townships have merely identified form-based design standards, while leaving Haring the unfettered discretion to determine the specific use(s) to be allowed. Section 6(c) cannot be "a little bit pregnant" on this subject. It either authorizes a contractual restriction on the transferee unit's zoning authority or it does not. Appellees effectively admit that it does, and so the Court should accept that admission, as being consistent with Act 425's directive that a conditional transfer agreement be a "written contract" that "control[s]" the type of "industrial or commercial enterprise or housing development" (MCL 124.21(a)) that is being planned by the contracting "local units."

REQUEST FOR RELIEF

For the additional reasons stated herein, the Townships respectfully request that this Honorable Court reverse the lower courts' decisions in all respects.

Respectfully submitted,

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Dated: July 28, 2016

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[10] The latter option plainly binds the *zoning* ordinance authority of the transferee unit because, if a Meijer store is not already permitted on the transferred area, then the land must be rezoned to allow it. And even if a Meijer store was already permitted by the pre-existing zoning, the transferee unit would then be contractually compelled to *not* amend the zoning of the transferred area in any way that would prohibit a Meijer store before the store was built. In this respect, either a positive or negative restriction on the transferee unit's legislative zoning authority is still a contractual zoning restriction.